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The Views of a Plaintiff's Counsel

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The Views of a Plaintiff's Counsel

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A recent editorial[1] suggests that statistics, when cited out of context, are often meaningless and even deceptive. Reference to a statistic, in order to be meaningful, should therefore be supplemented by an explanation of the various factors and methods by which such statistic is derived. The editorial concludes that, although statistics are often useful, they should be closely examined before too much credence is placed in them. The attitude of insurance companies toward personal injury claims and their manner of handling them suggest additional and appropriate comments regarding the value and use of statistics, and particularly about the misuse of statistics.[2]

That casualty insurance companies pay annually a substantial amount of money in satisfaction of claims against their numerous assured is undoubtedly true, and not at all surprising since that is their major purpose in being. But statistics involving such matters would be more meaningful if, when citing the annual payout, the insurance companies also made known the total premium income plus total investment income. It would also be helpful if the same statistical presentation would set forth the overhead expense or annual cost of administering these "trust funds"[3] made up of premium receipts and earnings. Of some significance would be the annual expenditures devoted solely to reducing the economic value of human life in the public mind. A serious question exists with regard to the propriety of using such funds to divert public thinking from major issues and to induce antisocial and even unlawful results.[4]

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1. Block That Phony Statistic, Life, Nov. 17, 1961, p. 6.

2. A prime example of this device for misleading is the assertion that estimated annual payments are made by insurance companies of over $350,000,000.00 for settlement of "false and fraudulent claims." This obviously cannot be supported by proof and is a serious and irresponsible indictment of broad nature and with vast implications. This type of persuasive effort deserves condemnation.

3. In Griffin, *What Is My Injury Claim Worth?*, 1953 INS. L.J. 519, the author states: "The insurance companies operate on the laws of great numbers and base their operations on the averages resulting therefrom. They collect from many to pay the unfortunate few. This makes the insurance companies trustees of the funds of their policyholders." See also Sedgwick, *Automobile Insurance Litigation Today*, 1952 INS. L.J. 816.

4. Constant and extensive efforts are made by insurance interests and groups through newspaper and magazine advertisements, direct mailing, printed material sent out with premium notices, and similar means to reach the widest coverage, appealing to self-interest and attempting to persuade potential jurors that returning substantial verdicts will increase the cost of living, as well as their individual expenses in varied ways.

Without resort to any statistics we can agree that the care, compensation and economic rehabilitation of the injured victims of our industrialized, mechanized and now computerized civilization is, and for some time has been, one of the major problems confronting our society and, more particularly, the legal profession. From every evil comes some good, and the tremendous growth of the insurance industry is largely attributable to this social phenomenon. Compensation for personal injury provides a means to assuage our social conscience and alleviate the community guilt feelings which are a foreseeable consequence of the repetitive carnage we daily experience and observe. But merely creating the framework and the machinery to achieve this end is futile if we fail to provide an effective implementation for its use.

Every lawyer, regardless of the nature of his practice and the degree of his dedication and sense of idealism, must be affected to some extent by the philosophical concepts which have guided the historical development of our profession. The law is continuously engaged in the process of utilizing experience and common sense for the resolution of social problems. Our efforts to formulate a workable code of acceptable rules and procedures are complicated by our vastly materialistic society. The idealistic principles which we adopt to maintain the high and ennobling standards of our profession are also designed to provide additional protections for clients. They occasionally are self-defeating and serve to compound the problems inherent in the personal injury situation. To charge the plaintiff's attorney with an objective detachment and unemotional appraisal of his injured worker client, who for months or years is physically unable to support himself and his family and progressively loses all of his hard-gained physical possessions, and his self-respect, tends to make counsel an inhuman automaton. Such result would remove from the profession one of its greatest strengths—an understanding of and sensitivity for humanity. It is in this framework of socio-legal outlook that the plaintiff's attorney accepts the representation of the personal injury claimant.

A pure utopian outlook would view this situation as one in which claimant's counsel meets with the insurance representative—not on an adversary basis, but with the joint objective of providing every possible aid toward the economic rehabilitation of the claimant. The mores and standards of our civilization, together with normal human frailty and human characteristics molded by our state of society, realistically point to the impossibility of such an idealistic approach. The utter impossibility of a mutually objective consideration of the problem by plaintiff's counsel and the insurance company representative is apparent. Compounding the confusion is the presence of the conflict of interests of the insurance company. While theoretically representing its assured, and seeking to provide the protection it has been

engaged for, the company is primarily influenced by a profit motive and has a constant, sometimes overpowering, awareness of its obligation to its stockholders. Unfortunately this militates against any similar feeling of responsibility to the injured victim, who is the supposed beneficiary of the public insurance trust, and the person for whom it exists. The annual statement and its statistical achievements are constantly placed before the company's employees; who can say this consideration does not outweigh whatever feeling of responsibility the company may have for its assured? If there be any concern for the well-being and future of the injured claimant, it is minimal and at most an annoying intrusion upon the scene.

Nor is the insurance company's representative impeded by any restrictive framework of prescribed ethics.[5] His consideration of the problem as one involving just another file with certain factual incidents, usually in substantial dispute, does not lend itself to amicable discussion, with tolerance and human understanding moving the problem toward compromise. This is not submitted in critical vein, but only to suggest the realities of the situation.

The claimant's counsel accepts, with the act of representation, the responsibility to secure for his client compensation for all damages sustained, as supported by the evidence and permitted by the law. He must ascertain his client's personality, his academic background and past performance, his earning potential, his pain threshold, and in short every human and economic aspect of his client so that the effects of the occurrence upon this specific individual may be determined. While it is true that the injured claimant is not entitled to enjoy a windfall because he has suffered injury, he does nevertheless have the right to expect every possible material aid which the law makes possible and the facts warrant. And he rightfully expects his attorney to take every proper step to achieve such a favorable result. There has never been any question that our law supports the right to recover *completely* for damage to *property,* where any recovery is warranted. Would anyone argue against the existence of a similar total right where damage to the *person* is involved? Compare the situation of the businessman whose stock, machinery, or property has been destroyed or badly damaged by the act of a tortfeasor, with that of the wage earner whose earning potential has been destroyed or damaged by a wrongdoer's misconduct. The businessman can recover his cost of repair or replacement, as well as for depreciation,

5. Many years ago a statement of principles and agreement was formulated by and between representatives of the American Bar Association and the insurance industry. This interesting document, reaffirmed every few years (see 80 A.B.A. REP. 568-571 (1955)), includes the concession that the insurance company has a direct financial interest in the claim presented against a policyholder; agrees that neither the insurance company nor its representative will advise a claimant as to his legal rights; agrees that if any witness or party making a signed statement so requests, he shall be given a copy thereof. This latter agreement particularly is uniformly and universally breached.

for loss of use and for other considerations designed by the law to restore him to his former condition. Can the wage earner ever be returned to his prior condition of well-being? Can his lost or damaged earning power be replaced? Does the reimbursement of his money losses restore his self-respect? Does it fully compensate for his crippled condition, for the deteriorating frustration of the feeling of uselessness? His complete inventory is his earning potential, and its destruction or substantial impairment is vastly damaging in every respect.

Until quite recently the well organized and highly experienced insurance industry had rare interference in its handling of claims of the injured. Those few attorneys who represented the injured were cast upon their own generally inadequate resources in endeavoring to determine the facts, and in their efforts to secure proper and full relief for their clients. The unfortunate victim who dealt directly with the insurance representative could hardly hope to receive an objective consideration of his legal rights and his damage picture from one whose conditioning and interests moved him in the opposite direction. Consider the inequality of the positions of the respective parties and perhaps a statistic could be evolved which would indicate how many millions of injured persons have been defrauded and how many billions of dollars have been withheld and improperly diverted from those entitled to receive this money. The law's reverence for the sanctity of the written contract, particularly when executed under seal, resulted in the erection of exceedingly difficult legal hurdles to one seeking to set aside a release for settlement of a disputed claim.

With the organization in 1948 of the National Association of Claimant's Counsel of America (NACCA), a group of attorneys representing injured claimants has dedicated itself to providing full legal protection for those unfortunate victims who have become casualties of our industrial society. Now, for the first time in our history, the injured plaintiff has an organized, competent, and effective professional group in his corner dedicated to aid him in securing justice. Understandably, some insurance companies are unhappy with this movement toward strengthening and unifying the opposing forces. But this equalization of positions tends to insure that justice will be effected. Among attributes of this group is its dynamic interest in the field of continuing legal education which has sparked a like interest in every national, state and local bar association in the country.

The attorney engaged in handling personal injury claims must consider several basic propositions which can help to establish principles of practice as well as of fairness and logic. First, each case should be analyzed and evaluated on its individual merits without regard to comparable results in seemingly similar matters. Just as no two fingerprints are identical, so no

two persons or personalities are exactly alike. The earning potential, the threshold of pain, the physical repairability of damaged bodily structures vary widely in all of us. A client is entitled to have *his* condition and *his* damage considered, and not to be handled as a member of a group plan with scheduled injuries. Comparison with other cases involving somewhat similar facts and injuries is generally of little value. There is no accredited clearing house to establish a standard of values in such situations. Other settlements or verdicts may reflect little more than the individual negotiating ability or trial competency of counsel, rather than the fair value of the plaintiff's damages.[6]

Residence or geographical location of the plaintiff is not a criterion for determining the amount of damage he sustained. The citizen of a small town or rural community should not be relegated to a lower economic level than his city cousin merely because of this domiciliary factor. The costs of living throughout the country are generally high, wherever one lives. That the claimant living in the small town should, in consequence, find his damage situation evaluated at one-half to one-tenth of what could be recovered were he living or litigating in a metropolitan area, is incredible, though too often true. That we as attorneys have aided in the creation and maintenance of this geographical classification and concept of inequality of right is professional dereliction which cannot be condoned. Vigorous and continuous efforts should be made to eradicate such inequity.[7]

Nor can plaintiff's counsel subscribe to the quick and easy (though usually inaccurate and unjust) method traditionally employed by defense representatives for evaluating a claim by multiplying the special damages by an arbitrarily magic figure (generally 2 or 3). There never was any validity to this mechanical production procedure and its sole justification was that it was speedy, required no thought and eliminated all complexity and problems for everybody except the plaintiff. That it also eliminated any aspect of humanity and of fairness seems never to have disturbed the proponents of this system. The classic approach by the insurance adjustor, required by his company to recommend a reserve figure, was to ask counsel for the total amount of special damages. Upon receiving this figure he could with lightning speed approximate the value of the claim and negotiations could then proceed downward.

During the past several decades, we have experienced an awakening of a national social consciousness and a recognition of the value of the human being to an extent which is unparalleled in our history. So rapid has been

6. "[E]very case is an individual one and general principles hardly settle awards for pain and suffering or for permanent . . . impairment." Marino v. United States, 234 F.2d 317, 318 (2d Cir. 1956).

7. See LORRY, A CIVIL ACTION—THE TRIAL 8 (1959).

this social and economic change that our law has had difficulty in keeping pace with the concomitant reappraisal of values. That our people are our greatest natural resource, as they are of any nation, is a basic truth; that it has taken so long to accept this proposition is remarkable and perhaps indicates a long existing weakness which we are now in the process of correcting. The valuable metals of the earth, the huge oil reserves, and all the chemical elements of the universe are valueless without their utilization by the ingenuity and minds of people. A legal system bottomed on the keynote of justice for all must inevitably provide a means of fairly evaluating and reimbursing damage to a unit of such value and importance.

One of the lessons learned from an industrialized society is that the assembly line process gives volume production but not necessarily quality products. Although it would be most desirable to achieve justice uniformly, extensively and in substantial quantity, this valuable commodity cannot be obtained by assembly line or production methods. It should be a completely individualized procedure, though the rules must be general and in such form as to be broadly applicable to multiple diverse situations. It must be designed to produce a result of the highest quality. The plaintiff's lawyer, in the realization of this goal, performs a necessary task—not alone for the personal interest of the individual needing such aid, but in the development and modification of substantive law and formulation of effective procedures directed toward advancing this philosophy of humanism. It is the responsibility of the lawyer who would represent injured claimants to seek to change the law where it cannot and does not serve the needs of our current society. Counsel cannot lightly reject the representation because of an ancient adverse decision which is no longer compatible with our modern way of life and our advanced social thinking. It is the attorney's obligation to keep the lifeblood of the law freely flowing and, where necessary, to secure the judicial release of the legal tourniquet which threatens to induce a community gangrene. This is generally a frustrating and expensive task and calls for dedicated effort and an extreme amount of vigor, fortitude and mental application. It may take repeated attempts to effect the necessary change. But if we are to meet our obligation to society and our profession we cannot, under the guise of stare decisis, acquiesce in the continuance of a strangling rule of inequity. Stability and uniformity in the law are desirable objectives, yet the law must remain vibrantly alive and changing to keep pace with the advancement of and variations in our concepts, manners, customs and modes of living. If stare decisis is proclaimed as prohibitive of change then rigor mortis must result and the body of law will suffer rigidity and an inadaptability to the needs of society and the individual. It is essential that the plaintiff's lawyer inquire into the implicit assumptions upon which the perti-

nent principles of law rest. Due to their conditioning and natural resistance to change, as well as the effect of long exposure to the traditions of their profession, lawyers, and many judges as well, are prone to accept without question the correctness of past principles and their applicability to the present. This leads to the maintenance of inequity and the perpetuation of injustice.[8]

It is difficult to negotiate with a defense representative who is irretrievably bound to nineteenth (and sometimes eighteenth) century values. Such outlook makes for a completely adversary situation in almost any claim and reduces the possibility of obtaining for a client everything he is entitled to obtain, by amicable methods. This means that the plaintiff's counsel must evaluate the insurance company and its claims representative, and determine as well their attitude and policy. It is often difficult to ascertain those factors, and because of this unknown though strongly influencing consideration it is generally desirable to institute suit as soon as counsel's development of the case permits such action. It is just as possible, and frequently easier, to negotiate a claim into settlement after suit is started, than before. In the interim the litigation is moving closer to trial and there is a continuing compulsion to meet, discuss and possibly settle the claim. Utilization of discovery procedures will aid both sides in determining the relative strength of positions. The pre-trial conference may frequently assist in the formulation of counsel's conclusions, especially when presided over by a knowledgeable, conscientious and reasonably firm judge.

The law school endeavors to teach the student how to analyze a factual situation, determine the issues involved, and apply the pertinent law in resolution of the problem. These competencies are called into play when the injured claimant enlists counsel's aid. In the main they should not present any great difficulty to the reasonably able and effective lawyer. Securing every detailed bit of information from a client may be tedious and time consuming, but it is necessary. Included must be much data which may not be directly relevant to the issues involved, but is essential for an evaluation of the client, his personality, individuality, and potential as a productive human unit. The special damages, or out-of-pocket expenses, can be readily ascertained from the several sources of this information, such as employer,

8. "There is nothing sacred in a principle of law merely because it originated in antiquity. . . . It can serve no good purpose today to perpetuate archaic rules of law, slavishly, in situations not contemplated when the rules were formulated." Goodell's Estate, 53 Pa. D.&C. 13, 19 (1945).

"[T]he doctrine of stare decisis is beneficial and desirable but it should neither be used as a crutch, substituting the majesty of its authority for the drudgery of research and exposition, nor as a cyclone cellar in which we of the Court can find ready refuge from the hurricanes born of our own mistakes." Sheppard v. Michigan National Bank, 348 Mich. 577, 598, 83 N.W.2d 614, 623 (1957).

doctor, hospital and the like. The two damage elements which always generate controversy are the pain and suffering which plaintiff has experienced and will continue to bear, and the impairment of future earning power. The latter should present less of a problem since its presence, nature and extent are more readily ascertainable. Numerous factual determinants are discoverable from which the nature and extent of physical impairment, and the effect of such condition on the plaintiff's ability to earn can be learned. Medical sources are frequently helpful. A relatively easy situation would be one involving a pick and shovel worker who had had his arm amputated at the shoulder so that no prosthetic device could be used. If he were lacking in any formal education so that his economic horizon was almost completely restricted to manual labor jobs, his permanent condition might mean substantial or total disability. If similar injury was inflicted upon a concert violinist, a situation with a much larger annual loss factor would result. Life expectancy tables are readily available as are discount tables to determine present worth. Most of this is simple arithmetic which presents no difficulty. Though opposing counsel might disagree on the period of working expectancy, this is subject to compromise. Since most people have little or no investment experience, the discount factor to determine present worth should be, at most, the interest paid by savings banks in plaintiff's city. This would vary, at the present time, from 2½ to 3½ percent.[9]

More difficult to compromise are cases involving such conditions as traumatic neurosis, chronic lumbo-sacral sprain, and the like, particularly where the plaintiff is trying to rehabilitate himself by working, but perhaps aggravating his condition by his effort. Supported by irreconcilably differing medical reports from their respective doctors, each side arrives at substantially different conclusions and totals. If there can be no compromise, a jury must determine this element of damage after counsel has introduced evidence of its every aspect. But plaintiff's counsel cannot substitute complete surrender for compromise. For this kind of supine acquiescence the claimant would need no attorney. To provide proper representation of his client in respect to this portion of the claim, plaintiff's counsel must project his vision to encompass the balance of plaintiff's life. Any short-changing of the plaintiff in this instance will inevitably lead to tragedy for himself and his immediate

9. There is a general misapprehension among many attorneys and a few judges that present worth is necessarily calculated on the basis of 6%, since this is the maximum legal interest rate in Pennsylvania. The rule is that there should be applied as the discount rate such interest as a person with the plaintiff's investment experience, knowledge, and skill could safely secure in the community where he lives, in the exercise of care and prudence. Chesapeake & O. R. Co. v. Kelly, 241 U.S. 485 (1916). Perhaps the best standard is that set forth by the court in Yates v. Dann, 124 F. Supp. 125 (D. Del. 1954), in which future losses were discounted at the rate of 2½%, "the figure which all the insurance companies use in the calculation of annuities."

family. Of great importance is the community aspect. If the plaintiff finds himself unable to earn a living and to take care of his family, society will not permit him to starve or be cast into the street. This creates a community burden which the tort-feasor or his carrier should be compelled to bear. It is of great importance that plaintiff's counsel develop every detail regarding this element of damage and be prepared to present it for maximum compensation, either by settlement or trial.

Perhaps the broadest area of disagreement is that involving the claim for damages for pain and suffering. Much criticism has been made of the efforts by plaintiff's counsel to aid the jury in evaluating this damage item. Apparently the defense would rather that the traditional confession of inadequacy be continued, namely, that no guide and no standard is available for the determination of fair compensation for the pain and suffering plaintiff has sustained. Many courts, which concur in a belief that we have not been able to develop any means of aiding the jury in this regard, assure the continuance of such inadequacy by refusing to permit counsel to suggest any formula or process of evaluating this element of damages. After a substantial verdict, these same courts seem to develop a restrictive conscience which flinches from the jury's evaluation. For the judicial conscience to be shocked there must be some standard which has been rejected or departed from. Where no such standard exists, there would not appear to be any basis for the court to set aside a verdict on the ground of excessiveness. If counsel has soundly developed the nature of plaintiff's pain, the degree of suffering he experienced, the duration of such condition and its expectable period of continuation, he has provided a proper basis for whatever the aggregate judgment of a jury may be.

These are the considerations which affect, influence and guide the determination of conscientious counsel. There is no halfway measure to total justice. The practical considerations which are involved in compromise efforts must not be applied so as to prejudice the claimant, but only in order to effectuate substantial justice in an area admittedly afflicted by vagueness and tenuous standards. The standard of values which our society has developed is influenced by the success or failure of the efforts of plaintiff's counsel. The danger is that we may feel impelled to compromise basic principles because of our feeling that greater prejudice may result from our inability to meet our problems with the machinery and methods we currently employ. It is ironical that while intensive efforts are pursued to erect a ceiling on human values, no appreciable attempt is made to control or restrict the limits of the mechanical forces produced in huge quantities and employed to commit the damage.

The greatest reward which any lawyer can gain is the self-satisfaction

of having contributed to the achievement of justice. No area of practice offers more extensive opportunity for the attainment of this goal than the representation of the injured. But by the same token the failure to provide this protection in full measure to the great number of wage earners in this country, would result in a downgrading of the legal profession, with a corresponding loss of esteem and respect, from which we would not recover for many decades. Men of learning, of good will and understanding representing both sides can and will resolve the differences which up to now have deterred us from reaching our goal.